Office - Supreme Court, U. S.
FILED
JAN 23 1952
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 557

HARRY A. LORD, ROY DIAL, BERTHA H. DIAL, ET AL.,

Appellants,

vs.

A. H. HENDERSON, AS DIRECTOR OF THE MOTOR VEHICLE DEPARTMENT OF THE STATE OF CALIFORNIA, ET AL.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

EDMUND G. BROWN,
Attorney General of California,
FRANK W. RICHARDS,
Deputy Attorney General of California,
Counsel for Appellees.

TOPICAL INDEX

	Page
Statement of case	2
Jurisdictional Question	3
Lord v. *Henderson*, Action No. 17237	3
Lord v. *Henderson*, Action No. 17238	4
Roy Dial, et al., v. *Henderson*, and *Utility Trailer Sales Co., et al.* v. *Henderson*, Actions Nos. 17239 and 17240	4
Averments of Fact	5
Averments of Law	7
Argument	8
I. (a) The law is settled that caravaning, the business engaged in by plaintiff Lord, constitutes a special class of traffic which may be taxed or charged differently from other classes of highway traffic	8
(b) The evidence in the *Lord* case set forth in the decision of the District Court of appeal, establishes the fact that the drivers are casually engaged; that caravans increase the inconvenience and hazard to passing traffic and that cars coupled together often have a tendency to skid, sway out of line, or to jack-knife when compelled to stop suddenly	9
II. The law is settled that the use of highways such as engaged in by plaintiffs Roy Dial et al., and Utility Trailer Sales Company, et al., constitutes a special class of traffic which may be taxed or charged differently from other classes of highway traffic	11
III. The fee of $15.00 for the declared purposes is not arbitrary, unreasonable or excessive in amount	14
IV. The statute does not discriminate between persons using the highways entirely within a single zone and those using the same highways but continuing on and using other highways	16
V. The fees collected become a part of the motor vehicle fund in the state treasury	17
Conclusion	18

List of Authorities Cited

Cases: Page

Acro Mayflower T. Co. v. *Georgia Pub. Serv. Com.*, 295 U.S. 285, 55 S. Ct. 709 — 4

Capitol Greyhound Lines v. *Brice*, 339 U.S. 542, 70 S. Ct. 806 — 5

City of Boston v. *Jackson*, 260 U.S. 309, 43 S. Ct. 129 — 5

Clark v. *Paul Gray, Inc.*, 306 U.S. 583, 59 S. Ct. 744 — 4, 8

Clark v. *Poor*, 274 U.S. 554, 47 S. Ct. 702 — 4, 13

Dixie Ohio Express Co. v. *State Revenue Com.*, 306 U.S. 72, 59 S. Ct. 435 — 4

Equitable Life Assurance Soc. v. *Brown*, 187 U.S. 308 23 S. Ct. 123 — 5

Hodge Drive-It-Yourself, et al. v. *City of Cincinnati, et al.*, 284 U.S. 335, 52 S. Ct. 144 — 4, 13

Leonard v. *Vicksburg S. & P. R. Co.*, 198 U. S. 416, 25 S. Ct. 750 — 4

Lord v. *Henderson*, 105 A.C.A. 535, 234 Pac. 2d 197 — 2

Lord v. *Ingels*, 64 Cal. App. 2d 559 — 3

Morf v. *Bingaman*, 298 U.S. 407, 56 S. Ct. 756 — 4, 8

Packard v. *Bantan*, 264 U.S. 140, 44 S. Ct. 257 — 4, 13

Waters-Pierce Oil Co. v. *Texas*, 212 U.S. 86, 29 S. Ct. 220 — 9

Statutes

Calif. Stats. 1937, ch. 788, p. 2253 — 2

Caravan Act, Sec. 7 — 17

Code of Civil Procedure, Sec. 583 — 3

Streets and Highways Code, Sec. 2101 — 18

U.S.C.A. Title 28, Sec. 1257 — 3, 4

Vehicle Code, Sec. 777 — 18

Vehicle Code, Sec. 781 — 18

Constitutions

U. S. Const. Art. I, Sec. 8 — 7

U.S. Const. Fourteenth Amendment — 7

Rules of Court

Supreme Court Rules, Rule 7, par. 4 — 5

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 557

D.C.A. Nos. 17237 and 17238

HARRY A. LORD,

vs. *Plaintiff and Appellant,*

A. H. HENDERSON, as Director of the Motor Vehicle Department of the State of California,

Defendants and Appellees.

D.C.A. No. 17239

ROY DIAL, ET AL.,

vs. *Plaintiffs and Appellants,*

A. H. HENDERSON, as Director of the Motor Vehicle Department of the State of California,

Defendants and Appellees.

D.C.A. No. 17240

UTILITY TRAILER SALES COMPANY, a Corporation, ET AL.,

vs. *Plaintiffs and Appellants,*

A. H. HENDERSON, as Director of the Motor Vehicle Department of the State of California,

Defendants and Appellees.

APPELLEES' STATEMENT OPPOSING JURISDICTION, INCLUDING MOTION TO DISMISS APPEAL OR AFFIRM THE JUDGMENTS.

Appellees respectfully present the following matters making against the jurisdiction of this honorable court asserted by appellants.

Statement of Case

The plaintiffs in actions Nos. 17238, 17239 and 17240 filed a complaint in the Superior Court of Los Angeles County, State of California, to enjoin the enforcement of a statute, Chapter 788, Statutes of 1937, page 2253, of the State of California. The actions were consolidated for trial, and following a lengthy trial thereof the court declared the statute unconstitutional. The defendants appeaied and the District Court of Appeal of the State of California, Second Appellate District, Division One, held the statute constitutional and reversed the judgments of the lower court with instructions to the trial court to enter judgments for the defendants and to enter an order in cause No. 17237 directing that the moneys (apparently in the sum of $86,177.50) now held in a special fund by the Department of Motor Vehicles be paid into the State Treasury. (*Lord* v. *Henderson*, 105 A.C.A. 535, 106 A.C.A. 6, as amended on petition for rehearing; 234 Pac. 2d 197.) The Supreme Court of California denied a hearing. (37 A.C. No. 24, p. 761 (1).)

The statute involved is commonly known as the "Caravan Act." It requires a special permit of the Motor Vehicle Department, for the issuance of which a fee of Fifteen dollars is exacted, to transport any vehicle subject to registration under the Vehicle Code on the highways of California on its own wheels for the purpose of selling or offering the same for sale to or by any agent, dealer, purchaser or prospective purchaser, whether such agent, dealer, purchaser or prospective purchaser may be located within or without the State. The statute divides the State into two zones and exempts the procurement of such permit if the transportation is confined to points within a single zone. The fee paid for any caravaning permit is in lieu of all

other registration and license fees for the use of public highways in this State during the period that such vehicle is operated in accordance with the permit, which is valid for a period of six months after date of issuance. Seven and fifty one-hundredths dollars ($7.50) of said fee is compensation for the privilege of using the public highways of this State and the remaining seven and fifty one-hundredths dollars ($7.50) of said fee is to reimburse the State for expense incurred in administering police regulations pertaining to the operation of vehicles moved pursuant to such permits and to public safety upon the highways as affected by such operation. All of said fees collected shall be paid into and become a part of the Motor Vehicle Fund in the State Treasury.

Jurisdictional Question

A final judgment or decree rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court of the United States where is drawn in question the validity of a State Statute on the ground of its being repugnant to the constitution of the United States and the decision is in favor of its validity. (Title 28 U.S.C.A. sec. 1257.)

Lord v. Henderson, Action No. 17237

In *Lord* v. *Henderson*, District Court of Appeal No. 17237, this action was dismissed in 1942 under section 583 of the Code of Civil Procedure for failure of plaintiff to bring the same to trial within five (5) years after the filing thereof. The order of dismissal was affirmed on appeal. (*Lord* v. *Ingels*, 64 Cal. App. 2d 559.) The order entered therein directing the moneys (apparently in the sum of $86,177.50), which were caravan fees paid by Lord and which are now held in a special fund by the Department of Motor Vehicles pending the determination of the consti-

tutionality of said statute in action No. 17238, be paid into the State Treasury is not a judgment or decree that is appealable under section 1257 of Title 28, U.S.C.A. Therefore, the appeal in this action should be dismissed by this honorable court. The execution of said order has been stayed by the District Court of Appeal pending the appeal in *Lord* v. *Henderson*, action No. 17238.

Lord v. Henderson, Action No. 17238

The validity of said statute as against the assaults made thereon by appellant Lord in action No. 17238 was upheld by this honorable court in the following case:

Clark v. *Paul Gray, Inc.*, 306 U. S. 583, 59 S. Ct. 744.

The validity of a similar statute of the State of New Mexico was upheld by this honorable court in the following case:

Morf v. *Bingaman*, 298 U. S. 407, 56 S. Ct. 756.

Roy Dial, et al., v. Henderson, and Utility Trailer Sales Co., et al. v. Henderson, Actions Nos. 17239 and 17240

The validity of said statute as against the assaults made thereon by these appellants is sustained by decisions of this honorable court in the following cases:

Clark v. *Poor*, 274 U. S. 554, 47 S. Ct. 702, 703;
Packard v. *Banton*, 264 U. S. 140, 44 S. Ct. 257, 259;
Hodge Drive-It-Yourself, et al., v. *City of Cincinnati, et al.*, 284 U. S. 335, 52 S. Ct. 144;
Dixie Ohio Express Co. v. *State Revenue Com.*, 306 U. S. 72, 59 S. Ct. 435;
Aero Mayflower T. Co. v. *Georgia Pub. Serv. Com.*, 295 U. S. 285, 55 S. Ct. 709;
Capitol Greyhound Lines v. *Brice*, 339 U. S. 542, 70 S. Ct. 806.

"The court will receive a motion to affirm on the ground that it is manifest that the appeal was taken for delay only, or that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument." Rule 7, par. 4, Supreme Court Rules.

". . . when the questions presented on such a motion are found by the court, in view of our previous decisions, to be so wanting in substance as not to need further argument, we dispose of the case."

City of Boston v. *Jackson*, 260 U. S. 309, 43 S. Ct. 129, 113.

". . . that the Federal question thus suggested had been so explicitly foreclosed by previous decisions as to leave no room for real controversy."

Leonard v. Vicksburg S. & P. R. Co., 198 U. S. 416, 25 S. Ct. 750, 753.

"From the analysis just made, it results that although a Federal question was raised below in a "formal manner, that question, when examined with reference to the *averments of fact* upon which it was made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject, and hence to cause the Federal question relied upon to be devoid of any substantial foundation or merit." (Emphasis added.)

Equitable Life Assurance Society v. *Brown*, 187 U. S. 308, 23 S. Ct. 123, 125.

Averments of Fact

Plaintiff Lord in action No. 17238, avers in his complaint for injunctive relief against the enforcement of the statute

as to him that he is engaged in the business of caravaning automobiles from various eastern states, such as Indiana, Michigan and Illinois, into the State of California for distributors and dealers in automobiles doing business in the State of California, and that the defendants have demanded and received of plaintiff fees for caravaning cars and will continue in the future to demand and receive such fees pursuant to the terms and provisions of Chapter 788, Statutes of 1937, of the State of California.

Plaintiffs Dial, et al., in action No. 17239, aver in their complaint for injunctive relief against the enforcement of the statute as to them that they are in the business of dealing in used cars in the City of Long Beach, California, under the fictitious firm name of "The Roy Dial Company"; that the company buys cars in Arizona and Illinois and transports them singly on their own wheels and under their own power into California for the purpose of sale; that each is a passenger type automobile and bears license plates of the state from which it is transported, and that defendants demand that plaintiffs pay caravan fees on each automobile thus transported under and by virtue of Chapter 788, Statutes of 1937, of the State of California.

Plaintiffs Utility Trailer Sales Company, a corporation, et al., in action No. 17240, aver in their complaint for injunctive relief against the enforcement of the statute as to them that they sell and market the products of the Utility Trailer Manufacturing Company, Inc.; that they take delivery at Los Angeles and transport trailers, the products of the manufacturing company, upon their own wheels to points in Arizona and Northern California out of Zone 1 as defined by Chapter 788, Statutes of 1937, of the State of California, as amended, and that said statute is being enforced by defendants against plaintiffs.

Averments of Law

Plaintiffs in each action aver that said statute is unconstitutional in that it is in contravention of and repugnant to section 8 of Article I (Commerce Clause) and the Fourteenth Amendment of the Constitution of the United States.

The grounds alleged by plaintiffs why said statute is in contravention of and repugnant to the commerce clause are (a) it places a direct burden upon interstate commerce and attempts to regulate it, (b) it is not a regulatory statute but a revenue measure only, (c) it is not based upon any reasonable basis of licenses but is arbitrary, discriminatory and unfair, (d) it is in no sense a police regulation of the use of the highways of the State of California or for the protection of health, morals or safety of the State, (e) it constitutes an illegal charge for the privilege of engaging in interstate commerce, and (f) the charges and fees under said statute are arbitrary, unreasonable and excessive in amount.

The grounds alleged by plaintiffs why said statute is in contravention of and repugnant to the Fourteenth Amendment of the Constitution of the United States are (a) deprives plaintiffs of property without due process of law and denies them equal protection of the law in that it applies to persons, firms and corporations using the highways for the purpose of sale and not to others who use the highways for pleasure or for purposes other than sale, which distinction and classification is arbitrary and unreasonable, (b) the fee charged is disproportionate to other fees charged by the State of California, either for the registration of vehicles or for using the highways, and is exorbitant, arbitrary and unfair, and (c) it discriminates between persons using the highways entirely within a single zone and those using the same highways but continuing on and using other highways.

ARGUMENT

I

(a) The Law Is Settled That Caravaning, the Business Engaged in by Plaintiff Lord, Constitutes a Special Class of Traffic Which May Be Taxed or Charged Differently from Other Classes of Highway Traffic.

In *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 59 S. Ct. 744, this honorable court held that this statute (Ch. 788, Statutes of 1937, of the State of California), did not impose a forbidden burden on interstate commerce or infringe the due process or equal protection clauses of the Fourteenth Amendment. The evidence showed (59 S. Ct. at page 751(17)) that Paul Gray, Inc., caravans its cars for sale in California from Detroit, Michigan, and St. Joseph, Missouri, and that its cars move in caravans of from nineteen to twenty-five cars. The court said, "From what has been said it is evident, as was decided in *Morf* v. *Bingaman*, *supra* (298 U. S. 407), that cars moving in caravans of the type described constitute a special class of traffic which may be taxed or charged for differently from other classes without infringing the equal protection clause."

In *Morf* v. *Bingaman*, *supra*, (298 U. S. 407, 56 S. Ct. 756, at page 758) the court stated:

> "The facts, as stipulated, establish that the transportation of automobiles across the state in caravans, for the purpose of sale, is a distinct class of business, of considerable magnitude. Large numbers of such cars move over the highways in caravans or processions. Seventy-five to eighty per cent. of the cars in appellant's caravans are in units of two, coupled together by tow bars. Each unit is in charge of a single driver, who operates the forward car and thus controls the movement of both cars by the use of the mechanism and

brakes of one. Appellant's drivers, except two or three regularly employed, are casually engaged. They usually serve without pay and bear their own expenses in order to secure transportation to the point of destination, although a few receive very small remuneration and expenses. The Legislature may readily have concluded, as did the trial court, that the drivers have little interest in the business or the vehicles they drive and less regard than drivers of state licensed cars for the safety and convenience of others using the highways. The evidence supports the inference that cars thus coupled and controlled frequently skid, especially on curves, causing more than the usual wear and tear on the road; that this and other increased difficulties in the operation of the coupled cars, and the length of the caravans, increase the inconvenience and hazard to passing traffic. Car trouble to any one car sometimes results in stalling the entire caravan. The state has found it expedient to make special provisions for the inspection and policing of caravans moving in this traffic."

(b) The Evidence in the Lord Case Set Forth in the Decision of the District Court of Appeal, Establishes the Fact That the Drivers Are Casually Engaged, That Caravans Increase the Inconvenience and Hazard to Passing Traffic and That Cars Coupled Together Often Have a Tendency to Skid, Sway out of Line, or to Jack-Knife When Compelled to Stop Suddenly.

In *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86, 29 S. Ct. 220, 221, this honorable court stated relative to its jurisdiction to review the proceedings of the state courts:

". . . Nor does this court sit to review the finding of facts made in the state court, but accepts the findings of the court of the state upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court."

The facts found by the District Court of Appeal as to Lord's use of the highways are as follows:

". . . Lord caravans passenger motor vehicles, generally in pairs, i.e., a lead car and a car in tow-tandem style. The tandem is propelled by the lead car in which the driver sits. Usually the caravan or fleet of these tandem-hookups aggregates ten or so tandems (20 cars) plus a single car for the manager of the fleet and a single follow-up car driven by a mechanic. The cars for the most part are gathered at Detroit, Chicago, and Kansas City and are then driven overland to the principal coast cities of California. The drivers are recruited through want ads in newspapers at the point from which the trek originates. These want ads offer free motor transportation to California with meals and lodging en route together with $25.00 to $50.00 to the drivers for the services rendered.

". . .

"Most of the drivers engaged by many caravan operators to caravan vehicles have never been in California and are wholly unfamiliar with mountain driving encountered on their route in this state. In many instances they are under age and often below the age required for an operator's license in California. The drivers generally do not have California operator's licenses and quite often no licenses from any other state. By proceeding in a caravan or as a fleet, the manager and mechanic can keep a check that would not otherwise be possible. If one car becomes disabled the whole fleet stops on or alongside the road so that the mechanic can repair the car or attach it to some other car in the fleet. The necessity of driving the cars in a fleet tends to keep one tandem after another rather closely together. On a two-lane highway, and there are several at the boundaries of the state, cars behind the fleet necessarily encounter difficulty in getting ahead of the fleet as a whole or in between the various tandems. It seems quite probable that the recruit drivers of the tandems oftentimes are not inclined to be very courteous to other cars on the highway, as for instance to aid them in passing or enable them to get into the line when necessary to avoid oncoming cars.

> When the tandem cars are compelled to stop suddenly, there is often a tendency to skid, to sway out of line or to 'jack-knife,' because the brakes on the forward car must alone serve for both cars. The front part of the towed car, including the windshield, is usually covered up so as to avoid mud and rains thrown back and upon it by the lead-car. This procedure naturally obscures the vision of a driver behind such a tandem as he can only see cars ahead of the tandem by looking out of his own left window."

It is clear that caravaning, as engaged in by plaintiff Lord, constitutes a special class of traffic which may be taxed or charged differently from other classes of highway traffic.

II

The Law Is Settled That the Use of Highways Such as Engaged in by Plaintiffs Roy Dial et al., and Utility Trailer Sales Company, et al., Constitutes a Special Class of Traffic Which May Be Taxed or Charged Differently from Other Classes of Highway Traffic.

The facts found by the District Court of Appeal as to the use of the highways by plaintiffs Roy Dial, et al. and Utility Trailer Sales Company, et al., are as follows:

> "The plaintiff Dial is a used car dealer with his principal place of business at Long Beach. As a part of his business operations he buys passenger-type automobiles in Chicago and causes them to be driven on their own wheels, with their foreign license plates, to Long Beach by drivers who are procured through ads in Chicago newspapers. Except in rare instances the automobiles are not driven in caravans or convoys. The drivers receive no pay and, what is more, are required to pay for their own lodging and meals together with the gasoline and oil used by the particular vehicles

driven by them. There was evidence that such drivers took the minimum time for sleep en route.

"The three plaintiff corporations Utility Trailer Sales Company (of Los Angeles), the Utility Trailer Sales Company of San Francisco, and the Utility Trailer Sales Company of Fresno are all engaged in selling the products of a manufacturer of commercial truck trailers and vans known as Utility Trailer Manufacturing Company. The sales companies all take delivery of the truck-trailers or vans at Los Angeles and then transport them on their own wheels in tow of another vehicle to their respective warehouses or sales rooms. The trailers or vans are of various sizes weighing when empty between 4,000 and 18,000 pounds. As a rule, it is not practicable to transport these trailers or vans by railroad because of their size, the cost of transportation and lack of cranes to unload them and hence they must be driven to their destination on the highways. They are not driven in caravans, except in rare instances.

". . .

"Unquestionably, the operation of a single passenger-type vehicle or of two such cars driven tandem is not as hazardous, as when driven as a part of a large caravan, fleet or convoy or as is the case of two large trucks or vans driven tandem. Nevertheless, the operation by Dial differs only from that of Lord in that his passenger motor vehicles are not operated in tandem or as a part of a caravan. However, Dial's drivers receive no pay whatever for their services nor do they receive lodging and food, and, what is more, must furnish such costs out of their own pockets, all of which is not true in the plaintiff sales companies, except that case of Lord. Accordingly, drivers of the type employed by Dial may be regarded as being inclined to be less careful than the type employed by Lord, as they are not supervised at all in the course of their cross-country trip and do not receive the financial return which Lord's drivers do.

"But quite apart from these differences in fact it

is obvious that the State may impose the caravan tax on these types of operation, unless it can be said that placing them within the purview of the statute here involved is otherwise improper." (234 Pac. 2d at pages 200, 202 and 203.)

In *Clark* v. *Poor*, 274 U. S. 554, 47 S. Ct. 702, 703, it is said:

". . . The highways are public property. . . . Users of them, although engaged exclusively in interstate commerce, may be required to contribute to their cost and upkeep."

In *Packard* v. *Banton*, 264 U. S. 140, 44 S. Ct. 257, 259, it is said:

". . . The streets belong to the public and are primarily for the use of the public in the ordinary way. Their use for the purpose of gain is special and extraordinary, and, generally, at least, may be prohibited or conditioned as the Legislature deems proper."

In *Hodge Drive-It-Yourself Co., et al.* v. *City of Cincinnati, et al.*, 284 U. S. 335, 52 S. Ct. 144-145, it is said:

"Unquestionably appellants contemplate that those hiring their cars will operate them upon the streets. In fact, such use of the streets is essential to appellants' business. It is a special and extraordinary use materially differing from operation of automobiles or trucks by owners or their chauffeurs in the usual way for private ends. The running of automobiles necessarily is attended by danger to persons and property in the vicinity; and, when they are negligently driven upon city streets, the peril is great. The court below found that the operation of automobiles by such hirers is extra-hazardous to the public. The state has power for the safety of the public to regulate the use of its public highways. (Citing authorities.) It may prohibit or condition as it deems proper the use of city streets as a place for the carrying on of private business."

As to plaintiffs Dial, et al., the decision of the District Court of Appeal, as we have heretofore pointed out, states that, "Accordingly, drivers of the type employed by Dial may be regarded as being inclined to be less careful than the type employed by Lord, as they are not supervised at all in the course of their cross-country trip and do not receive the financial return which Lord's drivers do."

As to plaintiffs Utility Trailer Sales Company, et al., who transport on their own wheels on the highways large commercial trucks and vans in tow of another vehicle from Los Angeles to Fresno, San Francisco and Arizona, it is axiomatic that this operation is extra-hazardous and causes extra wear, tear and upkeep of the highways.

It is clear that the operations engaged in by these plaintiffs constitute a special class of traffic which may be taxed or charged differently from other classes of highway traffic.

III

The Fee of $15.00 for the Declared Purposes Is Not Arbitrary, Unreasonable or Excessive in Amount

In *Clark* v. *Paul Gray, Inc.*, supra (59 S. Ct. at page 753 (24)), the court, in considering the reasonableness of the $15.00 fee exacted by the statute, said:

> "Here a fee of $7.50 is collected for administration and enforcement of the Act and a fee of like amount is charged for the use of the highways. Appellees have offered no proof that either of the fees is too large, although the burden rested upon them to show that the fees were excessive for the declared purposes. (Citing authorities.)
>
> ". . .
>
> "(27) The trial court seems to have thought, as appellees argue, that unreasonableness of the fees was established by proof that the same fees are not imposed on other classes of traffic. But since, as we have seen,

there is basic for the classification of the traffic, there is basis for a difference in fees charged the different classes. (Citing authorities.)"

The decision of the District Court of Appeal states:

". . . In that connection it needs to be observed that the Caravan Act tax is in lieu of all other taxes policing or otherwise so long as the vehicle taxed is not sold or exchanged during the six-month period and entirely regardless of the mileage covered by the vehicle over the state highways or any other factor. To illustrate how this can redound in favor of a caravan taxpayer as against a registered car owner, let us review the status of each at the end of five months. If a passenger vehicle is purchased for $3,000.00 in the Middle West and brought into the state and registered in January the registered owner must pay a license tax of $6.00, Vehicle Code, sec. 370, and an additional property tax of about $60.00, Rev. & Tax Code, sec. 10752. If he brings the car into the state and has it registered in June he pays only 7/12 of these amounts or a total of $38.50. In the case of a caravan owner he pays a caravan tax of only $15.00 if the vehicle is brought into the state in January and if it is sold and registered in June the purchaser pays only a tax of 7/12 of 66.00 or $38.50. Hence the charge against the car in the latter case for the caravan and registration fee is only $53.50 for the entire year as against a charge of $66.00 against the registered owner for the same length of time. This most certainly is not discrimination against caravaned vehicles.

". . .

"The record before us does not disclose the initial cost expended by the State for the highways used by the respondents or the maintenance thereof, nor the separate cost of policing the caravaning thereon or of administering the Caravan Act, with respect to these highways separate and apart from the Motor Vehicle Act. What is plainly shown is that the economic saving of the use of highways by the respondents over the use

of other modes of transportation exceeds many times over the cost either the policing license fee or the use of the highways. So viewed, we fail to see that either fee is excessive or discriminatory and we see no basis whatever for holding either to be unconstitutional upon any of the grounds assigned."
(234 Pac. 2d at page 206.)

IV

The Statute Does Not Discriminate Between Persons Using the Highways Entirely Within a Single Zone and Those Using the Same Highways But Continuing on and Using Other Highways.

In *Clark* v. *Paul Gray, Inc., supra* (59 S. Ct. at pages 751 and 752), the court, in construing the statute relative to its zoning provision, said:

". . . It was for the legislature to consider and decide whether the actual conditions which prevail in the state, affecting movement of cars for sale, eliminate or so reduce the burden of the caravan traffic on the highways as to call for a different classification of the short haul traffic for the purposes of regulation and fees. The legislature having made its classification by the establishment of zones, in the light of special conditions in the state, courts are not free to set aside its determination unless they can say that it is without any substantial basis. (Citing authorities.)

"The trial court found that cars are often moved in convoys in Zone 1, which includes the metropolitan area of Los Angeles, and it thought this sufficient to establish an unlawful discrimination without consideration of the other conditions affecting the intrazone traffic. The evidence "establishes, beyond any reasonable doubt, that the movement intrazone of cars for sale in convoys similar to that of appellees is negligible and that the principal sources of cars for

sale moving intrazone are the assembly plants of automobile manufacturers located in or near the metropolitan areas of Los Angeles and San Francisco."

As to the claim of plaintiffs herein that the Caravan Act discriminates against transporters and dealers having dealer plates who transport cars from without to within the state in favor of dealers who transport cars intrazone, the District Court of Appeals stated in its decision:

"The reason for exempting dealers or transporters from the operation of the caravan tax so long as they restrict their operations within a single zone is obvious. (Citing authority.) Dealers, as is well known, tend to confine their activities, of selling and demonstrating their vehicles to very limited areas, because of competitive and other conditions. In the case of heavier equipment such as large trucks, vans, and the like, an even lesser use is made of the highways due to the fact that buyers of such equipment generally do not require demonstrations of the equipment on the highways before making a purchase. However, such purchasers often come from "a distance or require delivery of the equipment to distant points within the state. But again the use of the highways of the state is quite negligible. Moreover, sales by such dealers lead to prompt registration of the vehicles and the payment of registration fees and quite substantial property taxes." (234 Pac. 2d at pages 204, 205.)

V

The Fees Collected Become a Part of the Motor Vehicle Fund in the State Treasury

Section 7 of the Caravan Act provides:

"All fees from the issuance of permits provided for under this act shall be collected by the Motor Vehicle Department. Such fees shall be paid into and become

a part of the Motor Vehicle Fund in the State Treasury."

Section 777 of the Vehicle Code provides:

> "Such moneys in the Motor Vehicle Fund as are appropriated in the Budget Act or any other appropriation act for the support of or expenditure by the departments of Motor Vehicles and California Highway Patrol shall be expended by the departments in carrying out the provisions of this code and in enforcing any other laws relating to vehicles or the use of highways."

Section 781 of the Vehicle Code provides for the transfer of unappropriated moneys at a certain time from the Motor Vehicle Fund to the Highway Users Tax Fund.

Section 2101 of the Streets and Highways Code, added in 1947, provides:

> "All moneys in the Highways Users Tax Fund and hereafter received in said fund are appropriated for the acquisition of rights of way for, and the construction, reconstruction, improvement, and maintenance of, public streets and highways subject to and in accordance with the provisions of this code."

Conclusion

Appellees move for a dismissal of the appeal in action No. 17237 on the ground that said appeal is not from a judgment or decree which draws in question the validity of a State statute.

Appellees move for a dismissal of the appeal or an affirmance of the judgment in actions Nos. 17238, 17239 and 17240 on the ground that the questions presented have been so explicitly foreclosed by previous decisions of this honorable court as to leave no room for real controversy.

and are so wanting in substance as not to need further argument.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General of California;
FRANK W. RICHARDS,
Deputy Attorney General,
Attorneys for Appellees.

FILED
JAN 29 1952
CHARLES ELMORE CROPL
CLER

IN THE

Supreme Court of the United States

October Term, 1951

No. 557

HARRY A. LORD, ROY DIAL, BERTHA K. DIAL, KENNETH W. NOWLING, and H. B. NOWLING, doing business under the fictitious name and style of the ROY DIAL COMPANY, UTILITY TRAILER SALES COMPANY, a corporation, UTILITY TRAILER SALES COMPANY OF SAN FRANCISCO, INC., a corporation; and UTILITY TRAILER SALES COMPANY OF FRESNO, INC., a corporation,

Plaintiffs and Appellants,

vs.

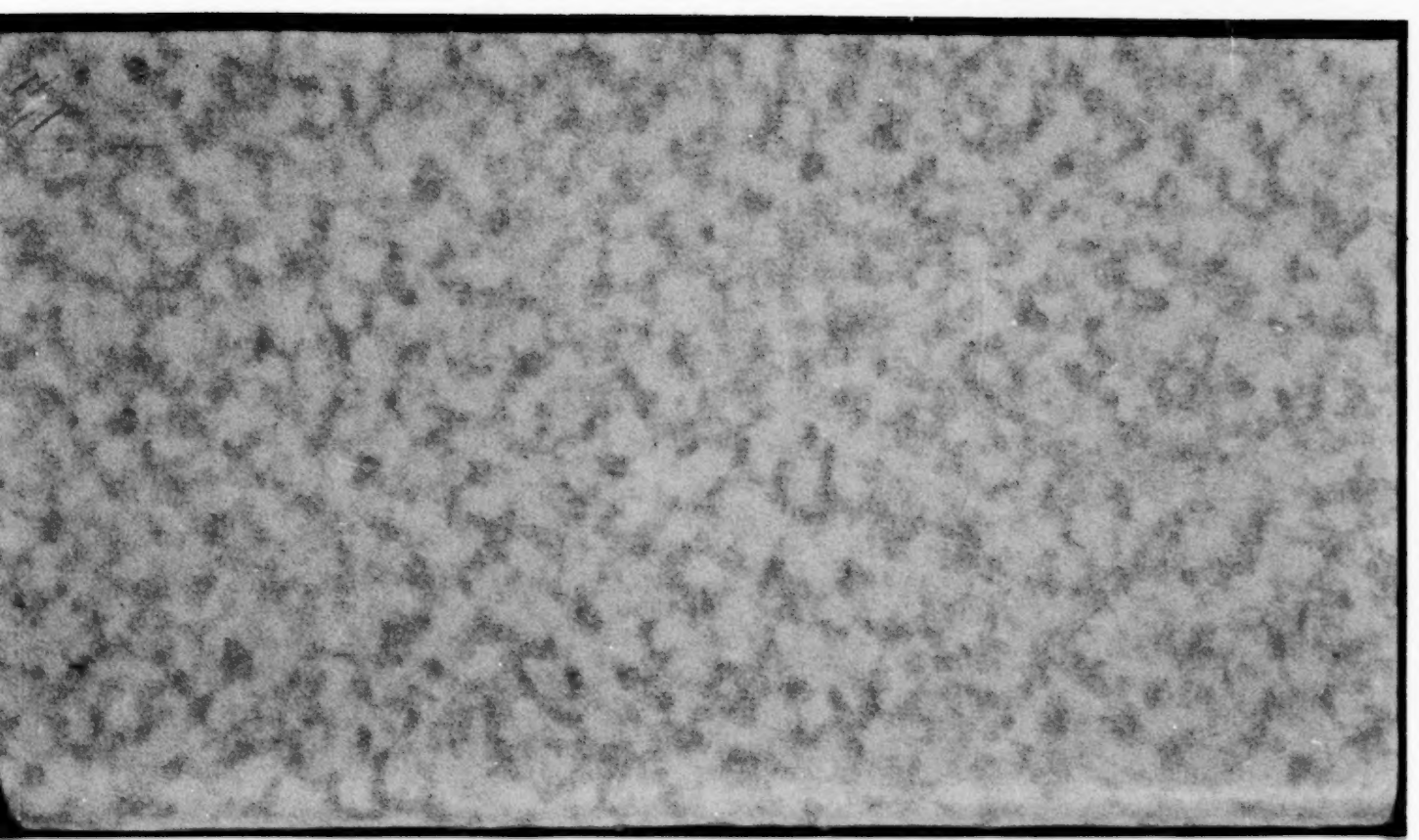
A. H. HENDERSON as Director of the Motor Vehicle Department of the State of California; THOMAS V. MALONEY, as Registrar of the Motor Vehicle Department of the State of California, and CLIFFORD E. PETERSON, Commissioner of the California Highway Patrol,

Defendants and Appellees.

Appellants' Brief Opposing Motion to Dismiss Appeal or Affirm the Judgments.

WARREN E. LIBBY,
1015 Spring Arcade Building,
541 South Spring Street,
Los Angeles 13, California,
Attorney for Appellants.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.



SUBJECT INDEX

PAGE

Lord v. Henderson, Action No. 17237, finality of judgment 2

Lord v. Henderson, Action No. 17238 3

Roy Dial v. Henderson, Action No. 17239; Utility Trailer Sales Co. v. Henderson, Action No. 17340 4

Argument 5

I.

The "facts" recited in the opinion by the District Court of Appeal are not determinative of the issue in these cases 5

A. Because the statute in question is unconstitutional irrespective thereof 6

B. Because it is the duty of the Supreme Court to determine for itself whether the facts found by the trial court justify the decision 6

C. Because, in any event, the Supreme Court will review findings of fact where necessary to pass on a federal question 8

II.

If the statute in question is unconstitutional as applied to any of the plaintiffs it must be held totally invalid as to all 9

Appendix "A." Order allowing appeal and stay of judgment ..... App. p. 1

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Brimmer v. Rebman, 138 U. S. 78	6
Clark v. Paul Grey, Inc., 306 U. S. 583	3, 5, 6
Cole v. Violette, 319 U. S. 581, 87 L. Ed. 1599	3
Creswill v. Grand Lodge Knights of Pythias of Georgia, 225 U. S. 246	8
Dean Milk Co. v. Madison, 340 U. S. 347	6
Department of Banking v. Pink, 317 U. S. 264, 87 L. Ed. 254	2, 3
Engels v. Morf, 300 U. S. 90	6
Interstate Transit v. Lindsay, 283 U. S. 183	6
Jones National Bank v. Yates, 240 U. S. 541	8
Kansas City Southern Ry. Co. v. C. H. Albers Commission Co., 223 U. S. 573	8
Liggett Co. v. Lee, 288 U. S. 517	6
McCarroll v. Dixie Greyhound Lines, 309 U. S. 176	6
Morf v. Bingaman, 298 U. S. 407	3
Richfield Oil Co. v. State Bd. of Equalization, 329 U. S. 69, 91 L. Ed. 80	2
Smith v. Cahoon, 283 U. S. 553	6, 9
Sprout v. South Bend, 277 U. S. 163	6
Waters-Pierce Oil Co. v. Texas, 212 U. S. 86	5, 6

STATUTES

California Code of Civil Procedure, Sec. 963(2)	2
United States Code, Title 28, Sec. 1257	4

TEXTBOOKS

Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States (1951 Ed.), Sec. 108, p. 199, Footnote 6	8

IN THE

Supreme Court of the United States

October Term, 1951

No. .....

HARRY A. LORD, ROY DIAL, BERTHA H. DIAL, KENNETH W. NOWLING, and H. B. NOWLING, doing business under the fictitious name and style of the ROY DIAL COMPANY, UTILITY TRAILER SALES COMPANY, a corporation, UTILITY TRAILER SALES COMPANY OF SAN FRANCISCO, INC., a corporation; and UTILITY TRAILER SALES COMPANY OF FRESNO, INC., a corporation,

Plaintiffs and Appellants,

vs.

A. H. HENDERSON as Director of the Motor Vehicle Department of the State of California; THOMAS V. MALONEY, as Registrar of the Motor Vehicle Department of the State of California, and CLIFFORD E. PETERSON, Commissioner of the California Highway Patrol,

Defendants and Appellees.

Appellants' Brief Opposing Motion to Dismiss Appeal or Affirm the Judgments.

Approaching each of the several consolidated cases, and the argument thereon, in the manner and order adopted by Appellee in its Statement Opposing Jurisdiction Including Motion to Dismiss Appeal or Affirm the Judgments, Appellants respectfully present the following observation, authorities, and argument in support of this Honorable Court's jurisdiction and duty to fully consider and decide the appeal herein.

Lord v. Henderson, Action No. 17237, Finality of Judgment.

The Special Order in Case No. 17237, directing the payment of funds to plaintiff Lord was appealed from by the Appellees themselves as a "special order made after final judgment," under the provisions of California Code of Civil Procedure, Section 963(2). They cannot now dispute this fact.

Upon such appeal the District Court of Appeal reversed this Order and directed the Superior Court to issue an Order of opposite effect. Under the authorities heretofore cited in Appellants' Statement as to Jurisdiction, this decision of the District Court of Appeal is final and no longer subject to review in any state court.

In determining the finality of a judgment or decree for purposes of review by the United States Supreme Court, the test is "whether the record shows that the order of the Appellate Court has in fact fully adjudicated rights and that adjudication is not subject to further review by a state court."

Dept. of Banking v. Pink, 317 U. S. 264, 87 L. Ed. 254;

Richfield Oil Co. v. State Bd. of Equalization, 329 U. S. 69, 72, 91 L. Ed. 80.

Where a state Appellate Court directs a lower state court to enter a specified judgment or decree and leaves no judicial discretion to the lower court, the final decree, for purpopes of review by the United States Supreme Court, is not the decree entered by the inferior state

court upon receipt of the remittitur, but the order of the Appellate Court directing the entry of the specified judgment or decree.

> *Dept. of Banking v. Pink*, 317 U. S. 264, 268, 87 L. Ed. 254;
>
> *Cole v. Violette*, 319 U. S. 581, 87 L. Ed. 1599.

Furthermore, counsel for Appellees argue in Statement Opposing Jurisdiction:

> "The execution of said Order has been stayed by the District Court of Appeal in *Lord v. Henderson*, Action No. 17238."

This is not the fact. The Order Allowing Appeal and Stay of Execution in this case (Appendix A attached hereto):

> "that said . . . Order in Second Civil No. 17237 concerning the special fund therein be suspended and stayed in all respects until final determination thereof (this appeal)."

It further orders on the same page:

> "that no security be required for the maintenance of the special fund under the Order in Second Civil No. 17237."

Lord v. Henderson, Action No. 17238.

Appellees contend that this case is already decided adversely by this court in the cases of *Clark v. Paul Grey, Inc.*, 306 U. S. 583, and *Morf v. Bingaman*, 298 U. S. 407. These cases and the inapplicability of their facts to this case are thoroughly distinguished and analyzed in Appellants' Statement as to Jurisdiction, which Appellants emphasize as their answer here.

Roy Dial v. Henderson, Action No. 17239; Utility Trailer Sales Co. v. Henderson, Action No. 17340.

In reply to Appellee's assertion that the validity of the statute in question as to these plaintiffs has already been decided and foreclosed by previous decisions of this Court, it should suffice to observe that none of the cases cited for such proposition were concerned with any statute even remotely similar to the California "Caravan Act," nor were the statutes involved in any of these cases attacked upon the particular grounds urged herein. It is submitted therefor, that any supposed analogy in principle or reasoning between these cases and the questions raised in the instant controversy may be urged only after consideration of the full record herein on appeal as provided by Section 1257 of Title 28, United States Code.

ARGUMENT.

I.

The "Facts" Recited in the Opinion by the District Court of Appeal Are Not Determinative of the Issue in These Cases.

The position that the questions raised by the instant controversy must be decided upon the basis of evidence introduced and stipulated to in the case of *Clark v. Paul Grey, Inc.*, 306 U. S. 583, has, as pointed out above, already been adequately met in Appellants' Statement on Jurisdiction heretofore filed herein, and it is apparent that the points set forth under "Argument" in Appellee's Statement and Motion add nothing calling for reply insofar as they merely constitute lengthy quotations from the Opinion in the *Clark* case and that of the District Court of Appeal herein appealed from.

Throughout each and all of these points however there appears an additional and somewhat different attempt to cause decision of this case upon the basis of various argumentative recitals and conclusions from the Opinion of the District Court of Appeal herein, the greatest part of which do not even pretend to be founded upon any actual evidence whatsoever. As authority for this proposition Appellees cite the case of *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, to the effect that findings of fact by a state court are binding upon the Supreme Court of the United States on appeal. Among the many objections to this line of reasoning Appellants respectfully call attention to the following:

A. Because the Statute in Question Is Unconstitutional Irrespective Thereof.

First, even taking these so-called "facts" recited in the Opinion of the District Court of Appeal at their face value, it is Appellants' position that the California Caravan Act must still be held unconstitutional as in contravention of the Interstate Commerce and Due Process Clauses of the United States Constitution. Among the many authorities, which it is desired to consider more fully in a proper brief to be filed herein, Appellants rely on the following:

Sprout v. South Bend, 277 U. S. 163;

Interstate Transit v. Lindsay, 283 U. S. 183;

Engels v. Morf, 300 U. S. 90;

Clark v. Paul Grey, Inc., 306 U. S. 583;

McCarroll v. Dixie Greyhound Lines, 309 U. S. 176;

Brimmer v. Rebman, 138 U. S. 78;

Dean Milk Co. v. Madison, 340 U. S. 347;

Smith v. Cahoon, 283 U. S. 553;

Liggett Co. v. Lee, 288 U. S. 517.

B. Because It Is the Duty of the Supreme Court to Determine for Itself Whether the Facts Found by the Trial Court Justify the Decision.

Secondly, the case of *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, relied on by Appellees to foreclose consideration of the District Court of Appeal herein was a case where the highest state court had affirmed findings of fact by the trial court. In the instant case it is evident from a reading of the Opinion that the State Appellate

Court did not purport to make any findings of fact whatsoever, but merely recited admitted preliminary facts concerning the nature of plaintiffs' business, and then completely ignored the trial court's specific findings of fact with such statements as "In the instant case there was an abundance of testimony which the trial court was not privileged to disbelieve, which would have warranted the Legislature in finding the facts directly contrary to the facts as found by the Court.", and numerous declarations that the trial court's findings were "beyond the judicial province" or "of no materiality to the solution of the questions before us." Indeed, in the case of plaintiff Dial the Opinion of the District Court of Appeal merely states that 'the operation of Dial differs only from that of Lord in that his passenger motor vehicles are not operated in tandem or as a part of a caravan," and "quite apart from these differences of fact it is obvious that the State may impose the Caravan Tax on these types of operation, unless it can be said that placing them within the purview of the statute here involved is otherwise improper." Concerning the amount of the tax involved, which is one of the principal issues raised by the pleadings, the Opinion of the District Court of Appeal did not dispute the correctness of the trial court's findings thereon but rather declares that irrespective thereof the amount involved was reasonable in the light of certain speculations as to the cost of construction of the state's highways and other such factors.

In such a case, where the Appellate Court does not make definite findings of fact itself, it is the duty of the

Supreme Court to determine for itself whether the facts found *by the trial court* justify the decision therein and, if so, whether there was substantial evidence to support these findings.

> *Jones National Bank v. Yates*, 240 U. S. 541, 552, 553.

C. Because, in Any Event, the Supreme Court Will Review Findings of Fact Where Necessary to Pass on a Federal Question.

Thirdly, even were we to consider these recitals in the Opinion of the District Court of Appeal as in the nature of "findings" it is now settled law that the Supreme Court of the United States will review the findings of fact by a state court where a federal right has been denied as a result of a finding shown by the record to be without evidence to support it.

> *Creswill v. Grand Lodge Knights of Pythias of Georgia*, 225 U. S. 246, 261,

or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the federal question to analyze the facts.

> *Kansas City Southern Ry. Co. v. C. H. Albers Commission Co.*, 223 U. S. 573, 591.

For a collection of cases establishing these propositions as the general rule, see:

> *Robertson & Kirkham Jurisdiction of the Supreme Court of the United States* (1951 Ed.), Section 108, page 199, Footnote 6.

II.

If the Statute in Question Is Unconstitutional as Applied to Any of the Plaintiffs It Must Be Held Totally Invalid as to All.

It is evident from a reading of the comprehensive provisions of the California Caravan Act that if it be held unconstitutional to impose an operational tax on those who drive single vehicles with intent to sell, such as plaintiff Dial, or on those who tow trailers with intent to sell, such as the plaintiffs Utility Trailer Sales Co., *et al.*, then there would be left no criteria whatsoever by which to impose the tax on plaintiff Lord or other persons using the highway.

Smith v. Cahoon, 283 U. S. 563.

Appellees' motion to dismiss should be denied.

Respectfully submitted,

WARREN E. LIBBY,
Attorney for Appellants.

APPENDIX "A."

Order Allowing Appeal and Stay of Judgment.

The plaintiffs-appellants above-named having duly made and filed their Petition for Allowance of Appeal to the Supreme Court of the United States from the final Judgment and Decree of this Court herein entered on July 16, 1951, and applied for a stay thereof pending final determination of said appeal, and having presented their Assignment of Errors and prayer for reversal, and their Statement of Jurisdiction of the Supreme Court of the United States on appeal from this Court pursuant to pertinent Statutes of the United States and the Rules of said Supreme Court in such cases made and provided,

Now Therefore, It Is Hereby Ordered that the said appeal be and the same is hereby allowed as prayed, and that said Judgment and Decree and the Order is Second Civil No. 17237 concerning the special fund therein be suspended and stayed in all respects until final determination thereof.

It Is Further Ordered that the undertaking as security for costs on appeal be and the same is hereby fixed in the amount of $250., and the undertaking as security for the stay of said Judgment and Decree be and the same is hereby fixed in the amount of $3,000., both to be given with good and sufficient surety and conditioned as may be required by law and the discretion of this Court and that no security be required for the maintenance of the special fund under the order in Second Civil No. 17237.

It Is Further Ordered that Citation shall issue to defendants and appellees in accordance with law.

.....

Presiding Justice.